82-528

Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

NO.

THE TRAVELERS INSURANCE COMPANY,
Petitioner

versus

TODD SHIPYARDS CORPORATION AND
THE VESSEL S/S KATRIN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRED E. SALLEY*
ESTELLE MAHONEY
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street, 28th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Petitioner

*Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Whether prevailing party litigants in contract disputes are automatically entitled to an award of attorney's fees and the Supreme Court's "American Rule" abdicated?

2. Whether the withered *Ryan* Doctrine should be expanded to apply to *any and all* breaches of implied maritime warranties?

3. Whether the Federal Courts will now refuse to enforce *any and all* express contractual indemnity clauses?

4. Whether the Federal District Courts no longer have discretion with regard to the issue of pre-judgment interest awards in admiralty cases?

5. Whether this Court will sanction the unequal treatment of similarly situated parties by the Federal Courts?

6. Whether Insurers are no longer free to contract the liabilities they wish to insure by the use of unambigious language in their policies?

LIST OF INTERESTED PARTIES

Counsel of record for The Travelers Insurance Company, insurer of Turbine Service, Inc. certifies and represents, in order that the Justices of this Court may evaluate possible disqualification or recusal, that the parties in the United States Court of Appeals for the Fifth Circuit are:

1. Auto Transportation S.A.

2. Todd Shipyards Corporation

3. Turbine Service, Inc.

4. Gonzales Manufacturing & Industrial Machine Works, Inc.

5. The Travelers Insurance Company

6. Sentry Insurance Company, a Mutual Company

TRAVELERS INSURANCE COMPANY SUBSIDIARIES AND AFFILIATES

Travelers Insurance Company lists the following subsidiaries and affiliates: Adria - TIC International Holdings, S.A.; Alt Management Corp.; American Liquid Trust; Ashland-Akaskan, Ltd.-(Okla.); Auger Insurance Agency, Inc.; Charles A. Boyer, Inc.; Brookview Village, Ltd.-(Ill.); C.S.I., Inc.; Caribbean Atlantic Life Insurance Company Limited; Caribbean Atlantic Life Insurance Company of Jamaica Ltd.; Caribbean Atlantic Life Insurance Company Trinidad and Tobago; Carpenter Brothers Insurance Agency, Inc.; The Charter Oak Fire Insurance Company; The Connecticut Fire Insurance Company; William F. Connelly, Jr., Inc.; H. C. Copeland Administrative Services, Inc.; H. C. Copeland and Associates Equities, Inc.; H. C. Copeland and Associates, Inc.; Constitution Fund; The Constitution State Insurance Company; Constitution State Management Company; Constitution State Service Company; Cornutt & McIntire Insurance, Inc.; Dana Point Marina Company-(Cal.); Derby Advertising, Inc.; Dugdale of Nebraska, Inc.; 89th and York Avenue Corporation; Employee Retirement Income Systems Company; Exsure, Inc.; Fiduciary Investment Company, Inc.; 400 University Avenue Prospect Company-(Canada); Four S Corporation; The Authur B. Fowler Agency, Inc.; Fund Administrators Inc.; Hilstead Insurance Agency, Inc.; Investment Companies Services Corporation; KCF Insurance Agency Inc.; Keystone Custodian Funds, Inc.; Keystone Custodian Funds Series

S-1, S-3, S-4, K-1, K-2, B-1, B-2 and B-4; Keystone International Fund, Inc.; Keystone Investment Management Company, Inc.; Keystone Massachusetts Inc.; Keystone Massachusetts Life Insurance Company; Keystone Provident Life Insurance Company; Keystone Real Estate Company; Keystone Securities Co., Inc.; LA Metropole S.A.; The Massachusetts Companies, Inc.; The Massachusetts Company Distributor, Inc.; Massachusetts Fund; The Massachusetts Fund For Tax Exempt Income; Massco Investment Management Corporation; Master Reserves Trust; Money Market/Option Investments, Inc.; Oak Creek Apartments-(Calif.); William F. O'Connor, Inc.; O'Hare Lake Office Plaza, Ltd.-(Ill.); Panther Valley Country Club, Inc.; Panther Valley Inc.; Panther Valley, Ltd.-(N.J.) and Subsidiaries; Panther Valley Service, Inc.; Park Newport Ltd.-(Calif.); Pequest Sewer Company; Pequest Water Company; The Phoenix Insurance Company; The Plaza Corporation (Formerly Constitution Plaza, Inc.); The Prospect Company; Prospect Management Services Company (Del.); E. Broox Randall & Sons, Inc.; Terra Nova Insurance Company Limited; TIC Auto Body Co., Inc.; TMC Insurance Agency, Inc.; Syd Tozier & Associates Insurance Brokers, Inc.; TRAVCAN Limited; Travelers American Properties (Five) N.V.; Travelers American Properties (Four) N.V.; Travelers American Properties (One) N.V.; Travelers American Properties (Six) N.V.; Travelers American Properties (Three) N.V.; Travelers American Properties (Two) N.V.; Travelers Asset Management International Corporation; Travelers Canada Corporation; The Travelers Corporation of Asia Limited; The Travelers Cor-

poration of Bermuda Limited; Travelers Equities Fund, Inc.; Travelers Equities Sales, Inc.; The Travelers Equity Fund No. 100 (Canada); The Travelers Equity Fund No. 10 (Bermuda); The Travelers Fund A for Variable Annuities; The Travelers Fund A-1 for Variable Annuities; The Travelers Fund B for Variable Contracts; The Travelers Fund B-1 for Variable Contracts; Travelers General Agency of Hawaii, Inc.; Travelers General Agency of Puerto Rico, Inc.; The Travelers Indemnity Company; The Travelers Indemnity Company of America; Travelers Indemnity Company of Canada; The Travelers Indemnity Company of Illinois; The Travelers Indemnity Company of Rhode Island; The Travelers Insurance Company of Illinois; Travelers Insurance Corporation Proprietary Limited; The Travelers Investment Management Company; The Travelers Life and Annuity Company; The Travelers Life Insurance Company; Travelers Life Insurance Company of Canada; The Travelers Life Insurance Company (Overseas) Ltd.; The Travelers Marine Corporation; The Travelers Massachusetts Option Income Trust; The Travelers Pension & Life Insurance Company; The Travelers Pooled Separate Account "A"; The Travelers Pooled Separate Account "B"; The Travelers Pooled Separate Account "C"; The Travelers Pooled Separate Account "D"; The Travelers Pooled Separate Account "M"; The Travelers Pooled Separate Account "N"; The Travelers Pooled Separate Account "R"; The Travelers Pooled Separate Account "S"; The Travelers Pooled Variable Annuity Fund "V" and "VI"; The Travelers Reinsurance Company of Bermuda, Limited; The Travelers

Separate Account "K"; The Travelers Separate Accounts for particular employers-13 Different Accounts; The Travelers Syndicate #1, Inc.; Travelers U.S. Property Bermuda, Limited; Travelers Variable Annuity Account V-1; Tri County Grove-(Fla.); West Village-(Penn.); Wibesla, Inc.; Joseph A. Wynne Agency Yorba Linda Apartments Ltd.-(Calif.); Yorba Linda 1-(Calif.).

TABLE OF CONTENTS

PAGE

Questions Presented For Review i
List of Interested Parties ii
Travelers Insurance Company Affiliations iii
Table of Contents vii
Table of Authorities viii
Opinions Below x
Jurisdiction of this Court x
Constitutional Provisions and Statutes Involved in the Case ..... *
Statement of the Case 1
Reasons for Granting the Writ 5
Conclusion 23

*Although the rules of the Supreme Court require this title to be included in the Table of Contents, Travelers has included no particular constitutional provisions or statutes in its petition.

TABLE OF AUTHORITIES

CASE	PAGE
Afran Transport Co. v. THE BERGECHIEF, 285 F.2d 119 (2nd Cir. 1960)	23
Agrico Chemical Co. v. M/V BEN W. MARTIN, 664 F.2d 85 (5th Cir. 1981), *reh. den.* 669 F.2d 733 (3 cases)	14
Aleyska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1945)	5, 6, 8
Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.CT. 629, 99 L.Ed. 911 (1955)	17
Breaux v. St. Paul Fire & Marine Insurance Company, 345 So.2d 204 (La. App. 1st Cir. 1977)	20
Cole v. Chevron Chem. Co.,-Oro Nite Div., 477 F.2d 361 (5th Cir. 1973), *reh. den.* 478 F.2d 1402 *cert. den.* 414 U.S. 978 (1973)	12
Continental Cas. Co. v. Canadian Universal Ins. Co., 605 F.2d 1340 (5th Cir. 1979), *cert. den. sub. nom. Canadian Universal Ins. Co. v. Continental Casualty Co.* 455 U.S. 929 (1979)	11, 12, 19
Esso International, Inc. v. The S.S. CAPTAIN JOHN, 443 F.2d 1144 (5th Cir. 1971)	21
FMC Corp. v. Continental Grain Co., 355 So.2d 953 (La. App. 4th Cir. 1977)	17
Fairmont Shipping Corp. v. Chevron International Oil Co., Inc., 511 F.2d 1252 (2nd Cir. 1975), *cert. den. sub. nom. Chevron International Oil Co. v. Fairmont Shipping Corp.* 423 U.S. 838	15
Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d 361 (9th Cir. 1974)	23
Grace Circle Line Sightseeing Yachts, Inc. v. Storbeck, 325 F.2d 338 (2nd Cir. 1963)	22, 23
Hartford Accident & Indemnity Company v. Case Foundation Co., 10 Ill. App. 3d 115, 294 N.E.2d 7 (1st Dist. 1973)	20

Havis v. Petroleum Helicopters, Inc., 664 F.2d 54 (5th Cir. 1981) 21

Holmes v. J. Ray McDermott & Co., Inc., __ F.2d __ Slip Op. No. 81-3486 (5th Cir., August 9, 1982) x

Jig The Third Corp. v. Puritan Marine Insurance Underwriters Corp., 519 F.2d 171 (5th Cir. 1975), *reh. den.* 522 F.2d 1280 *cert. den. sub. nom. Atlantic Marine, Inc. v. Jig The Third Corp.*, 424 U.S. 954 17

M.O.N.T. Boat Rental Services, Inc. v. Union Oil Co., 613 F.2d 576 (5th Cir. 1980) 11, 17

Mecom v. Levingston Shipbuilding Co., 622 F.2d 1209 (5th Cir. 1980) 21

Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977) 6

Norfolk v. Western R. Co. v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) *reh. den.* 445 U.S. 972 6

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed 133 (1956) 14

Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974), *cert. den. sub. nom. West India Carriers, Inc. v. Twenty Grand Offshore, Inc.*, 419 U.S. 836 17

Vobill Homes, Inc. v. Hartford Accident & Indemnity, Co., 179 So.2d 496 (La. App. 3rd Cir. 1965), *writ. ref.* 248 La. 698, 181 So.2d 398 20

Weyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958) ... 12, 19

Williamson v. Dick Alevine, d/b/a Dick's Garage & Truck Sales, Slip Op. No. 82-32 (La. App. 3rd Cir. July 2, 1982) 20

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals affirming in part, modifying in part, reversing in part and remanding the District Court's judgment against petitioner appears in Appendix A to this Petition, and is reported at __ F.2d __ Slip op. No. 79-1685 (5th Cir. April 29, 1982). The orders of the Court of Appeals denying a Petition for Rehearing and a Petition for Rehearing En Banc appear in Appendix B. The Opinion and Order of the District Court appears in Appendix C, and is reported at 467 F.Supp. 1259 (E.D. La. 1981).

JURISDICTION

The Fifth Circuit's Opinion and Judgment of April 29, 1982, affirming in part, modifying in part, reversing in part and remanding the District Court's judgment against petitioner is set forth in Appendix A (p. A-1). Its orders of June 14, 1982, denying timely Petitions for Rehearing and Rehearing En Banc, are set forth in Appendix B (p. A-56). This Petition for Certiorari is being filed within the prescribed period of ninety (90) days after June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

However, although petitioner believes it must preserve its rights by applying to this Court for writs, it feels that it must apprise the Court that the petition may be premature. That is, under *Holmes v. J. Ray McDermott & Co.*,

Inc. __ F.2d __ Slip Op. No. 81-3486 (5th Cir. August 9, 1982), as the amount of attorneys' fees, awarded by the District Court as an element of damages, was not determined in that court, the Fifth Circuit may not have had jurisdiction to hear the appeal.

STATEMENT OF THE CASE

This case involves an attempt by the Owners of the vessel KATRIN, Auto Transportation, S.A. ("Owners" or "Shipowners") to recover damages due to faulty repairs performed by Todd Shipyards Corporation ("Todd") and other repairers, Turbine Service, Inc. ("Turbine Service") and Gonzales Manufacturing and Industrial Machine Works, Inc. ("Gonzales"). The dispute arose out of allegedly faulty repairs performed to the Low Pressure ("LP") turbine of the vessel KATRIN. In February of 1975, the vessel entered Todd's repair yard in Algiers, Louisiana for, *inter alia*, inspection of the vessel's LP turbine. Todd engaged Turbine Service to open up the turbine for inspection. Todd obtained a bid from Turbine Service for the required repair of the LP turbine. Turbine Service, in turn, subcontracted a substantial portion of the work to Gonzales.

The work done on the LP turbine included the replacement and the repair of numerous blades of the KATRIN's LP turbine. The work performed on the LP turbine was accomplished during March, April, and May of 1975. The turbine was tested during two dock trials without major incident. However, on May 24, 1975, during the KATRIN's river trial, a "pinging" noise developed in the LP turbine. The KATRIN was returned to Todd's repair yard by tow, the LP turbine opened and considerable damage found. At that point, the Owners elected to ship the LP turbine to its original manufacturer, Siemens A.G.

("Siemens") in Germany. Some eight months later the LP turbine was returned to New Orleans and reinstalled by the Owners' own contractor, outside Todd's repair yard, under the supervision of the manufacturer's and Owners' representatives. The vessel sailed out of New Orleans on March 2, 1976.

The vessel then traded commercially for the next four months, albeit experiencing excessive temperatures in its condensor top. In July of 1976, while passing the Irish coast at Cork, the vessel's turbines suddenly seized and stopped. The vessel began drifting toward the coast, and preparations were made to abandon ship. Pursuant to orders given by the master, the chief engineer started the turbines and operated them long enough to bring the vessel away from the coast and subsequently, into Cork harbor. The damage to both the LP turbine and the High Pressure turbine due to this casualty was so extensive that the vessel was sold for scrap.

Suit was initiated on July 11, 1975. Todd sued Turbine Service and Gonzales demanding return of certain damaged turbine parts of the KATRIN; however, the true nature of the litigation was an action by the Shipowners to recover for damage to their vessel, the KATRIN. The main action had various interrelated claims, counter-claims, and cross-claims of the parties engrafted onto it. The parties' claims, summarized by the Trial Court at 467 F.Supp. 1269, were as follows:

(1) Shipowners sought recovery of an amount in excess of $3,000,000.00, the cost of repairing the LP turbine in Germany, loss in value by reason of the casualty off Cork, detention of the vessel during the various repairs, and related survey fees, export fees, and expenses. The Shipowners sued Todd, Turbine Service, Gonzales, and Turbine Service's and Gonzales' respective insurers, The Travelers Insurance Company ("Travelers") and Sentry Insurance Company ("Sentry").

(2) Todd counter-claimed against the Shipowners for the balance due on its repair invoices and an additional amount due for work ordered by the Shipowners' representative after the river trial casualty. Todd also cross-claimed against Turbine Service and Gonzales, as well as their respective insurers, for indemnity in the event that Todd was found liable to the Shipowners. Todd also sought the cost of its defense from those defendants. Todd, moreover, sought to recover sums paid to Turbine Service on account.

(3) Turbine Service and Travelers cross-claimed against Gonzales and Sentry for indemnity for negligent workmenship by Gonzales; Turbine Service counter-claimed against Todd and against the vessel to recover the unpaid balance of its invoices for the initial turbine repairs.

(4) Gonzales cross-claimed against the Shipowners to recover on its unpaid invoices. Gonzales also sought indem-

nity from Turbine Service for any liability it may have had to the Shipowners or Todd.

Trial of this matter began November 14, 1977, and ended May 23, 1978. After sixty-seven days of trial, twenty-eight witnesses, over seven thousand pages of deposition testimony and more than six hundred exhibits, the Trial Judge, Fred J. Cassibry, Jr., entered a judgment for the Owners, held Todd entitled to indemnity from Turbine Service and Gonzales, and held no exclusion of the insurance policies of Travelers or Sentry covering the subcontractors relieved those insurers from liability for damages caused by the subcontractors.

All of the parties, except the insolvent Turbine Service, appealed. Oral argument in the appeal was heard on February 1, 1982, and on April 29, 1982, the Court of Appeals, Dyer, Circuit Judge for the Eleventh Circuit, sitting by designation, held, *inter alia*, that:

(1) Turbine Service and Gonzales were required to indemnify Todd, but Turbine Service was not entitled to indemnity from Gonzales.

(2) The KATRIN's Owners were entitled to attorneys' fees and pre-judgment interest.

(3) Turbine Service's and Gonzales' insurers were not excluded from liability for damage to the entire ship or

damages attributable to the ship's "down time."

The Travelers Insurance Company filed timely Petitions for Rehearing and for Rehearing En Banc which were denied. Travelers now seeks relief from this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE COURT OF APPEALS' AFFIRMANCE OF THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO THE OWNERS OF THE S/S KATRIN IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

This Court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1945) with regard to the propriety of an award of attorneys' fees to a prevailing litigant stated:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from a loser. We are asked to fashion a far-reaching exception to this "American Rule"; but, having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.[1] 421 U.S. at 247

[1] Mr. Justice Marshall set forth the following exceptions to the "American Rule" in his dissenting opinion; however, *none are present in this case:*

The Supreme Court recently reaffirmed its commitment to the "American Rule" of non-recoverability of attorneys' fees in *Norfolk v. Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) [citing *Alyeska Pipeline Co., supra*, with approval].

Moreover, the Fifth Circuit's disregard of the American Rule brings it squarely in conflict with the Court of Appeals for the District of Columbia Circuit. In refusing to award attorneys' fees to the prevailing litigant, the court in *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977) stated:

> For our purposes, the most significant aspect of *Alyeska* is the Court's statement that its holding was based not on any evaluation of the merits of the rule barring attorney fees, 421 U.S. at 270, 95 S.Ct. 1612, but only on its conclusion that a rule so deeply rooted in court practice and congressional policy should not be departed from by courts, acting on their own, without legislative

---

(Footnote 1 continued)
In more recent cases, we have reiterated the same theme: while as a general rule attorneys' fees are not to be awarded to the successful litigant, the courts as well as the Legislature may create exceptions to that rule. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 391-392; *Hall v. Cole*, 412 U.S., at 5. Under the judgment exceptions, attorneys' fees have been assessed, without statutory authorization, for willful violation of a court order, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-428 (1923); for bad faith or oppressive litigation practices. *Vaughan v. Atkinson*, 369 U.S. 527, 530-531 (1962); and where the successful litigants have created a common fund for recovery or extended a substantial benefit to a class. *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Mills v. Electric Auto-Lite Co., supra*. 421 U.S. at 275.

guidance. *Id.* at 271, 95 S.Ct. 1612. *Alyeska*, thus, does not condemn the awarding of attorney fees to successful litigants *per se*; it only admonishes the courts not to take the initiative in fashioning 'drastic new rules' with respect to 'a policy matter that Congress has reserved for itself.' *Id.* at 269, 95 S.Ct. at 1627. 559 F.2d at 709.

The Trial Judge rejected the defendants' arguments that the proper measure of damages in this case was a tort measure of damages and instead awarded the Owners damages for breach of contract. The Trial Judge determined that the "proper measure of damages to be awarded Shipowners in this case" was:

> ...the sum of the cost of repairs to return the LP turbine to the state it would have been in had the contract been performed, necessary expenses during down time of the vessel, loss of profits during down time ... and costs and attorney's fees. [citations omitted.] (emphasis supplied). 467 F.Supp. at 1304.

The Fifth Circuit affirmed the award of attorneys' fees to the Owners and stated:

> [i]n this circuit foreseeable damages recoverable for breach of warranty of workmanlike performance include reasonable attorneys' fees and litigation expenses. [citing: *Strachan Shipping Co. v. Koinklyke Nederlandsche*, 324 F.2d 746 (5th Cir. 1963); *McCawley v. Ozeanosun Compania, Maritime, S.A.*, 505 F.2d 26 (5th Cir. 1974); 548 F.2d 581 (5th Cir. 1977)]. Slip Op. at 2163.

However, the cases relied upon by the Fifth Circuit to uphold the award of attorneys' fees and costs to the Owners are totally inapposite; they all involve the award of attorneys' fees and litigation expenses to parties forced to defend actions brought by third-parties to recover damages for personal injuries. These cases stand *only* for the proposition that damages recoverable for breach of warranty of workmanlike performance include the costs of defense of an action *for personal injuries* (1) caused by that breach and (2) brought by a person not a party to the contract.

The instant case is a suit by the Owners for *breach of contract*. The owners are claiming damages in their own name, and *not* as a result of being forced to defend a claim for personal injuries asserted against them by some third party. The contract between the KATRIN's Owners and Todd contained no specific provision in regard to the recovery of attorneys' fees for the breach thereof, although such a provision presumably would have been enforced. The parties, specifically found by the Trial Court at 467 F.Supp. 1274 to have been of equal bargaining power, chose not to address the issue of attorneys' fees in their contract. The absence of such a provision should result in a presumption that the issue was considered and rejected. The Fifth Circuit's sanctioning of the Trial Court's contrary holding constitutes an impermissible exercise in contract reformation under the guise of interpretation, as well as disregard for this Court's decision in *Aleyska, supra*.

There is only one conclusion that can be drawn from the Fifth Circuit's sanction of the award of attorneys' fees to the Owners. That is, in all future contract disputes, the Fifth Circuit, in contravention of this Court's mandate of the application of the "American Rule," will award attorneys' fees to a disgruntled party who did not have the business acumen to provide specifically for attorneys' fees in his contract and who manufactures a claim for breach of commercial warranty.

THE COURT OF APPEALS' AFFIRMANCE OF THE TRIAL COURT'S AWARD OF INDEMNITY TO THE NEGLIGENT TODD SHIPYARDS AND OF THE TRIAL COURT'S DENIAL OF INDEMNITY TO TURBINE SERVICE FROM GONZALES IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, AND DENIES PETITIONER EQUAL PROTECTION OF THE LAW

The purchase orders issued by Todd to Turbine Service, which the Trial Court found at 467 F.Supp. 1274 to be the "best reflection of the contract between [them]," contained the following clause:

> INDEMNIFICATION AND INSURANCE—Seller [Turbine Service] shall be liable for the loss of or damage to Buyer's [Todd's] or Buyer-furnished or Government-furnished property while such property is in Seller's possession. Seller agrees to carry fire and extended insurance coverage on all such property *and to indemnity and save Buyer harmless* from any and all judg-

> ments, orders, awards, costs, and expenses, including attorneys' fees, and also claims on account of damage to property or bodily injury (including death) which may be sustained by Seller, Seller's employees, Buyer, Buyer's employees, or third persons, arising out of or in connection with work performed for Buyer on premises occupied or under control of Buyer or Seller. (emphasis supplied.) Slip Op. at 2163 -64 n.8.

The Fifth Circuit's decision contains two completely contrary conclusions with regard to the nature and effect of this clause, neither of which is correct. The Fifth Circuit upheld the Trial Court's finding that the "sole negligence" exemption in the "red-letter clause" in the contract between the Owners and Todd was inapplicable and stated:

> Todd apparently had little confidence that the sole negligence clause would act as a liability buffer when it subcontracted work since it covered itself *by providing for a full indemnity from its subcontractor Turbine Service*, an unneeded protection if the exemption was applicable. Understandably, Todd has not favored us with any authority to support its position. (emphasis supplied.) Slip Op. at 2158.

However, in upholding the Trial Court's award of indemnity from Turbine Service to Todd on the basis of Turbine Service's breach of its implied warranty of workmanlike performance, the Fifth Circuit stated with regard to the same clause:

> ...the 'Indemnification and insurance' clause in the Purchase Order *does not speak to the indem-*

> *nification of Todd by Turbine Service* arising out of the unworkmanlike performance of Turbine Service under the contract, *but is obviously intended only to require insurance* to indemnity Todd for damage caused to its property or employees during a bailment of Todd's property. This is perfectly clear by a mere reading of the clause. (emphasis supplied.) Slip Op. at 2164.

As to the latter finding, a "mere reading of the clause" should have revealed that it is *not* limited to merely requiring Turbine Service to secure and maintain insurance on Todd's "property or employees." Turbine Service agreed *also*:

> to indemnify and save [Todd] harmless from ... claims on account of damage to property [not to "s ... property" as defined in the insurance part of the clause] or bodily injury, (including death) which may be sustained by Buyer...Buyer's property or...third persons... .

The former finding that Todd "covered itself by providing for a full indemnity from its subcontractor Turbine Service" is also erroneous for the indemnity provision contains *no* reference to indemnity for the consequences of Todd's *own negligence*. Prior to the Fifth Circuit's decision in the instant case, it was thought well-settled that an intent to indemnify the indemnitee for the consequences of his own negligence would not be inferred; the contract must clearly and specifically so provide. *M.O.N.T. Boat Rentals, Inc. v. Union Oil Co.*, 613 F.2d 576 (5th Cir. 1980); *Continental Cas. Co. v. Canadian Universal Ins. Co.*, 605

F.2d 1340 (5th Cir. 1979), *cert. den.* 455 U.S. 929 (1979); *Cole v. Chevron Chem. Co.*, 477 F.2d 361 (5th Cir. 1973), *cert. den.* 414 U.S. 978 (1973).

Further, although the Fifth Circuit conceded, as did the Trial Court, that the purchase orders issued by Todd to Turbine Service contained an *express* warranty that:

> ...all [Turbine Service's] goods and labor were to be merchantable and fitting in all respects for the purpose for which intended; and that Turbine Service's guarantee of all material, equipment, and labor would be co-extensive with Todd's guarantee to its customers, Slip Op. at 2164, n.8,

the panel nevertheless held:

> [t]he district court properly relied upon breach of the *implied* warranty of diligent and workmanlike performance of Turbine Service to award Todd indemnification from Turbine Service. *See Parfait v. Jahncke Service, Inc.*, 484 F.2d 296, 302 (5th Cir. 1973); *Garner v. Cities Service Tankers Corp.*, 456 F.2d 476, 481 (5th Cir. 1972); *Waterman Steamship Corporation v. David*, 353 F.2d 660, 665 (5th Cir. 1965); *cert. den.*, 384 U.S. 972, 86 S.Ct. 1863, 16 L.Ed.2d 683 (1966). (emphasis supplied.) Id.

The Fifth Circuit in so holding has apparently reversed this Court's holding in *Weyerhauser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 491 (1958), as well as the longstanding precedent in the Fifth Circuit, succinctly stated in *Continental Casualty Co. v. Canadian Universal Insurance Co., supra*:

As Judge Edward J. Boyle, Sr., the experienced judge who considered this issue in the first litigation, pointed out, the implied warranty recognized in *Ryan Stevedoring Co. v. Pan Atlantic Steamship Co.*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, *arises only in the absence of express provisions for indemnity. Weyerhauser Steamship Co. v. Nacirema Operating Co.*, 1958, 355 U.S. 563, 569, 78 S.Ct. 438, 442, 2 L.Ed. 491, 495; *Evans v. Triple R Welding & Oil Field Maintenance Corp.*, 5th Cir. 1973, 472 F.2d 713, 716; [citations partially omitted]. *Here there was an express contract for indemnity that superseded both any implied warranty and any implied right to indemnity.*

* * * *

The *delictual* rules of indemnity whereby a tort feasor who is actively negligent owes indemnity to one jointly cast who is only passively negligent, see *Magnum Marine v. Kenosha Auto Transport Corp.*, 5th Cir. 1973, 481 F.2d 933; *Tri-State Oil Tool Industries, Inc. v. North Marine Drilling Co.*, 5th Cir. 1969, 410 F.2d 178, are superseded by the implied WWLP, an implied contractual clause. *Parfait v. Jahncke Service, Inc.*, 5th Cir. 1973, 484 F.2d 296. *The contractual clause that would have been implied in the absence of express agreement is in turn superseded by the express provisions of the contract.* (emphasis partially added.) 605 F.2d at 1347-48.

More importantly, however, is the fact that *even absent any express indemnity agreement* between Todd and Turbine Service, an indemnity award on the basis of breach of an implied warranty of workmanlike performance is inappropriate under the facts of this case.

The Fifth Circuit upheld the Trial Court's award of indemnity under the *Ryan* Doctrine. [*Ryan Stevedoring Co. v. Pan Atlantic Steamship Co.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)]. However, in the recent case *Agrico Chemical Co. v. M/V BEN W. MARTIN*, 664 F.2d 85 (5th Cir. 1981), the Fifth Circuit articulated a contrary position with regard to the "withered" *Ryan* Doctrine:

> The *Ryan* doctrine thus includes two facets: an implied undertaking by a stevedore to render workmanlike performance and the stevedore's duty to indemnify the owner for liability arising out of its breach of the duty. The doctrine was developed in response to the *Sieracki* rule imposing on the shipowner a nondelegable duty, regardless of fault, to provide a seaworthy vessel to seamen and those who do seamen's work. We have recognized 'that the *Ryan* doctrine is designed to serve special problems in maritime law arising from the absolute and nondelegable duty of seaworthiness which general maritime law imposes upon all vessel owners.' *Hobart v. Sohio Petroleum Co.*, 445 F.2d 435, 438 (5th Cir.), *cert. den.* 404 U.S. 942, 92 S.Ct. 288, 30 L.Ed.2d 256 (1971). '*[T]he predicate of the doctrine is the shipowner's absolute nondelegable liability under the seaworthiness guaranty.' Id.* at 439. Therefore, in *Hobart*, we refused to extend *Ryan's* indemnity to protect a party who 'owes no more than ordinary duty to act as would a reasonably prudent person.' 445 F.2d at 440 (in that case, the shipper, rather than the shipowner). '*[P]roof of a breach of the warranty of workmanlike performance does not ipso facto* establish a right to indemnity by the vessel.' *F. J. Walker Ltd. v. Motor Vessel 'LEMONCORE'*. 561 F.2d 1138, 1148 (5th Cir. 1977). (emphasis supplied.) 664 F.2d at 86.

Moreover, as noted in *Fairmont Shipping Corp. v. Chevron International Oil Co., Inc.*, 511 F.2d 1252 (2d Cir. 1975):

> *Hobart* was one of a series of Fifth Circuit cases steadfastly refusing to extend *Ryan* indemnity to situations other than those involving a shipowner's liability for unseaworthiness. [citing] *Smith Petroleum Service Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1109 n.9 (5th Cir. 1970); *Loffland Brothers Co. v. Roberts*, 386 F.2d 540, 549 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830 (1968); *Centraal Stikstof Verkoopkanter, N. V. v. Walsh Stevedoring Co.*, 380 F.2d 523, 529 (5th Cir. 1967); *Ocean Drilling & Exploration Co. v. Berry Brothers Oilfield Service, Inc.*, 377 F.2d 511, 513 (5th Cir.), *cert. denied*, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967). 511 F.2d at 1257, n.7

In the instant case, Todd was under *no such absolute and nondelegable duty* with regard to its contract with the owners. Furthermore, Todd was found by the Trial Court and the Fifth Circuit to have negligently breached its contract with the owners, *not merely vicariously responsible* to them for Turbine Service's negligence. Therefore, since the "*predicate*" of absolute, nondelegable liability without regard to fault *is absent*, any award of indemnity under *Ryan* is completely without support in the law.

The *Agrico* Court recognized that, "Proportional damages based on degrees of fault is now the general rule for damages in maritime property damage cases." 664 F.2d at 86.

Travelers submits that, as in *Agrico*, disputes such as that between the instant parties "are best accommodated by a straightforward application of the usual comparative fault system." *Id.*

The Trial Court's decision granting Todd indemnity against Turbine Service avoided reference to the contractual indemnity provisions of Todd's Purchase Order contract and instead relied on what was deemed to be an implied warranty of diligent and workmanlike performance. On the other hand, the Trial Judge relied upon a "release"[2] in favor of Gonzales to deny Turbine Service's claim for indemnity based upon a breach of the warranty of diligent and workmanlike performance by Gonzales. 467 F.Supp. at 1303-1304. This so-called release was presented by Ron Hoover of Gonzales to Mr. Sheridan at the conclusion of Gonzales' welding work but before redelivery of the turbine parts. The release was not supported by any additional consideration from Gonzales and Jon Sheridan had *no authority* from Turbine Service to enter into contracts containing exculpatory clauses. (Reconstructed Woods' testimony, certified March 24, 1981). Mr. Wood's testimony that Sheridan had no authority to enter any such contracts was not refuted; no other evidence was offered on this point during the trial.

---

[2] "Gonzales Manufacturing & Industrial Machine Works, Inc. *makes no warranty as to the suitability of such repairs and accepts no liability for any possible failure in service or consequential damage arising from such failure.*" (emphasis added.)

Not only did the Fifth Circuit's sanction of the District Court's approach to indemnity for Todd and Turbine Service demonstrate an unequal treatment of these two parties, but it also constitutes failure to apply established principles of contract construction and interpretation of what was considered to be a binding agreement between these two parties.

Exculpatory clauses are not favored by the courts. *See, e. g. Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974). Louisiana law requires that exculpatory clauses and/or limitations of warranties meet certain standards. First, they must be express; second, they must result from mutual consent or a meeting of the minds; third, they must be made in good faith by the party relying upon them; and fourth, they must not contravene public policy. *FMC Corp. v. Continental Grain Co.*, 355 So.2d 953 (La. App. 4th Cir. 1977). Admiralty law also requires that exculpatory clauses of contracts be strictly construed. See, e.g., *M.O.N.T. Boat Rental v. Union Oil, etc., supra*, and *Jig The Third Corp. v. Puritan Marine Insurance Underwriters Corp., supra.*

The Trial Court held that the river trial breakdown was caused by "failure of a weld in one or two row 14 rotor blades causing the fracture of the blades at the weld". 467 F. Supp. at 1279. Gonzales' negligence was based upon improper and inadequate welds and welding procedures. 467 F.Supp. at 1289-91.

When the exculpatory clause of Gonzales' last minute "release" is construed in accordance with the principles cited in the preceding cases, it is clear that the exculpation for Gonzales' negligence in welding is not covered. (See 467 F.Supp. at 1303, n.29). The release merely states that Gonzales "makes no warranty as to the suitability of such repairs." Therefore, Gonzales' release only extended to the question of whether or not welding rotor blades was a suitable repair. It did not attempt to excuse Gonzales for negligently welding blades even if welding rotor blades was not a suitable repair. This point is especially important in this case since the District Court found that negligently welded blades were the cause of the river trial breakdown.

The refusal to grant Turbine Service indemnity against Gonzales is completely inconsistent with the existing principles of implied warranty of workmanlike performance which do apply between those parties because Turbine Service's agreements with Gonzales were all oral. No express contractual indemnity ever existed between Turbine Service and Gonzales. The District Court's decision denying Turbine Service indemnity was therefore erroneous and should be reversed as a matter of law.

The Fifth Circuit's decision to ignore, or at least discount, the existence of the express indemnity provision in the contract between Todd and Turbine Service rendered moot the issue of the watercraft exclusions in the policies issued to Turbine Service by Travelers. However, Travel-

ers believes that this Court has not choice but to correct the error, alter the Fifth Circuit's decision to conform with the principles espoused in *Weyerhauser Steamship Co., supra*, and *Continental Casualty Co., supra*, and give effect to the express indemnity provision in that contract.

Once it does, Travelers' watercraft policy exclusion defense will relieve Travelers from liability for virtually all of the Shipowners' claims. The insuring agreements of Travelers' Contractual Liability Endorsement provided, *inter alia:*

> ...the following exclusions also apply to contractual liability assumed by the Insured under any agreement relating to construction operations:
>
> (16) to bodily injury or property damage arising out of construction, maintenance or repair of watercraft or unloading thereof. (emphasis added.)

This watercraft exclusion is clear and free of all ambiguity. All of the services "for" the KATRIN performed by Turbine Service pursuant to its contract with Todd constituted "the maintenance and repair of a vessel." Travelers assumed no liability for those damages.

The only basis for indemnity from Turbine Service to Todd is under the repair contract. However, the Travelers' insurance policy explicitly excluded liability arising out of Turbine Service's contract if the contract related to the repair or maintenance of a vessel.

With regard to the other Travelers' policy exclusions, it should be noted that the Fifth Circuit's affirmance of the Trial Court's refusal to give effect to exclusions (k), (l) and (n) and its restrictive application of exclusion (o) are also incorrect, as they are in direct conflict with Louisiana law. As stated in *Breaux v. St. Paul Fire & Marine Insurance Company, infra*, Louisiana courts "recognize that liability policies are not Performance Bonds."

Williamson v. Dick Alevine d/b/a Dick's Garage and Truck Sales, Slip Op. No. 82-32, (La. App. 3d Cir. July 2, 1982),[3] and *Breaux v. St. Paul Fire & Marine Insurance Company*, 345 So.2d 204 (La. App. 3rd Cir. 1977)[4] would exclude from Travelers' coverage the Owners' claims for loss of use and for the *entire* cost of repairing the LP turbine.

Further, the language of Travelers' exclusion (n) (erroneously referred to as the "sistership exclusion") if analyzed with a little common sense, rather than viewed with slavish adherence to the gospel according to Long,[5] should have revealed to the Fifth Circuit that this exclusion is *not* limited to "recalls" but rather unambiguously excludes coverage for damages caused by and to *the* defective product *itself*.

---

[3] Reaffirming *Vobill Homes, Inc. v. Hartford Accident & Indemnity Co.*, 179 So.2d 496, (La. App. 3rd Cir. 11965), *writ. ref.* 248 La. 698, 181 So.2d 398.

[4] While also reaffirming *Vobill Homes, supra*, note 5, this case "adopts" Hartford Accident & Indemnity Co. v. The Case Foundation Co., 10 Ill. App. 3d 115, 294 N.E. 2d 7 (1st Dist. 1973).

[5] R. Long, *The Law of Liability Insurance* (1981) cited at Slip Op. page 2167.

THE COURT OF APPEALS' AWARD, *SUA SPONTE*, OF PRE-JUDGMENT INTEREST IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND AND NINTH CIRCUITS ON THAT ISSUE.

In awarding the Owners pre-judgment interest, the Fifth Circuit noted that the District Court *had* awarded *post*-judgment interest and stated:

> *No peculiar circumstances are apparent from the record* which would permit the exercise of discretion not to award pre-judgment interest. On remand, the district court will be directed to calculate and award pre-judgment interest. *See International Paint Co., Inc. v. M/V MISSION VIKING*, 637 F.2d 382, 386 (5th Cir. 1981). (emphasis supplied). Slip Op. at 2163.

That finding is, in itself, incorrect. First, it must be assumed that the District Court was intimately more familiar with the 83 volumes of the record of this "maritime blockbuster," as the Fifth Circuit termed the case. Slip Op. page 2151. This greater familiarity alone should have warranted affirming the Trial Court's refusal to award pre-judgment interest.

Second, the issue of pre-judgment interest was fully briefed by the parties at the request of the Trial Court. After due consideration of the issue, the Trial Court denied the Owners recovery of this claimed element of damages in an exercise of its "broad discretion." See, e.g., *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981) and

citations therein at 55; *Esso International, Inc. v. S.S. CAPTAIN JOHN,* 443 F.2d 1144 (5th Cir. 1971.

Third, in *Mecom v. Levingston Shipbuilding Co.,* 622 F.2d 1209 (5th Cir. 1980) the Fifth Circuit stated:

> Several factors may serve as an adequate basis for awarding interest only from the date of judgment. Among them are..., the existence of a genuine dispute regarding ultimate liability or the complexity of the factual and legal issues to be resolved, United States v. Cook, 5 Cir. 1972, 463 F.2d 123, and judgment in an amount substantially less than that claimed. Kawasaki Zosensho v. Cosulich Societa Triestina Di Navigazione, 5 Cir. 1926, 11 F.2d 836. (emphasis supplied.) 622 F.2d at 1210.

All of these enumerated factors *are present* in this case, and *are apparent* from the record. Accordingly, it was clear error for the Fifth Circuit to hold, in essence, that the Trial Court *abused its discretion* in denying the Owners' claim for pre-judgment interest. At the very least, instead of ordering the Trial Court to award pre-judgment interest, the Fifth Circuit should have remanded the issue to the Trial Court, as well as the others it remanded, for specific findings with regard to the denial.

Most important, however, is the fact that the Fifth Circuit's decision is in direct conflict with the decisions of the Second and Ninth Circuits on the issue of pre-judgment interest in admiralty cases. Both Circuits adhere to the rule that the decision with regard to entitlement (or non-

entitlement) to pre-judgment interest is committed to the broad discretion of the trial judge. See, e.g. *Grace Circle Line Sightseeing Yachts, Inc. v. Storbeck*, 325 F.2d 338 (2d Cir. 1963); *Afran Transport Co. v. THE BERGE CHIEF*, 285 F.2d 119 (2d Cir. 1960); *Grace Line, Inc. v. Todd Shipyards Co.*, 500 F.2d 361 (9th Cir. 1974). Those Courts of Appeals correctly refuse to disturb the findings of trial courts with regard to pre-judgment interest *unless* there is present an *abuse* of discretion. See, *Grace Circle Line Sightseeing Yachts, Inc. v. Storbeck, supra; Afran Transport Co. v. THE BERGE CHIEF, supra; Grace Line, Inc. v. Todd Shipyards Co., supra.* The Fifth Circuit has apparently chosen a conflicting standard of review with regard to this issue and this conflict in the Circuit Courts of Appeals must be resolved by this Court.

CONCLUSION

For the foregoing reasons—as well as any additional reasons presented by other parties who may seek certiorari to review these portions of the Fifth Circuit's decision—the Petition for Certiorari should be granted.